BEFORE THE COASTAL ZONE INDUSTRIAL CONTROL BOARD

FOR THE STATE OF DELAWARE

VANE LINE BUNKERING, INC., **Appellant,**	)	
v.	)	**APPEAL No. CZ 2006-01**
SECRETARY OF THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL, **Agency.**	)	

DECISION AND FINAL ORDER

Pursuant to notice published in accordance with 7 *Del. C.* §7007(d)[1] and 29 *Del. C.* ch. 101, a public hearing was conducted by the Coastal Zone Industrial Control Board (the "Board") on November 16, 2006, at the Terry Campus of the Delaware Technical and Community College, Dover, Kent County, Delaware, concerning the appeal filed on October 2, 2006, by Vane Line Bunkering, Inc. ("Vane") of a Coastal Zone Status Decision of the Secretary of the Delaware Department of Natural Resources and Environmental Control ("DNREC"). This written decision and order is issued by the Board pursuant to (and in accordance with) §7007(b) and 29 *Del.C.* §10128.

Members of the Board present and constituting a quorum were: Christine M. Waisanen (Chair), Victor Singer, Robert D. Welsh, Robert D. Bewick, Jr., Pallather M. Subramanian and Albert Holmes. Members Judy McKinney-Cherry and John S. Burton, Sr. were disqualified from consideration of the matter. Member Robert Wheatley was absent. Deputy Attorney General Frank N. Broujos represented the Board.

[1] All statutory sections cited in this decision refer to Chapter 70 (Coastal Zone Act) of Title 7 (Conservation) of the Delaware Code, unless otherwise noted.

Vane Line was represented by Elizabeth A. Wilburn, Esq. and Jane F. Barrett, Esq. of Blank Rome, LLP. Ms. Barrett was admitted *pro hac vice* in accordance with Delaware Supreme Court Rule 72 to appear in this matter and represent Vane. Deputy Attorney General Robert F. Phillips represented DNREC and DNREC Secretary John A. Hughes (the "Secretary").

STATEMENT OF THE CASE

Vane filed an application seeking a status decision by the Secretary under §7005 for its proposed oil lightering operation at the Big Stone Anchorage located in the Delaware Bay. Vane's proposed operation involves the lightering (i.e. transfer) of crude oil and No. 6 fuel oil from larger ocean going vessels (not owned by Vane) to Vane's vessels, for the subsequent transfer of the oil to its customers' ports and refineries on the Delaware River.

On September 12, 2006, the Secretary issued his status decision in response to Vane's request. The Secretary ruled that Vane's proposed oil lightering operation constitutes a new bulk product transfer facility and is therefore prohibited by the Coastal Zone Act (the "CZA"). The Secretary's status decision consisted of the following rationale:

> I have concluded that your lightering proposal would constitute a new offshore bulk product transfer facility in the Coastal Zone and therefore is prohibited. This conclusion is based on our belief that the lightering operation you propose is a prohibited activity that was not in operation on or before June 28, 1971, the effective date of the Coastal Zone Act. That statute "absolutely" prohibits the establishment of offshore, liquid or solid bulk product transfer facilities in the coastal zone after June 28, 1971. 7 *Del. C.* §7003.

On October 2, 2006 Vane appealed the Secretary's decision to the Board, in accordance with §7007.

PRELIMINARY MATTERS

On October 20, 2006, DNREC filed a prehearing motion titled "Motion To Dismiss Appeal or To Affirm Secretary's Order" (the "Motion") in opposition to Vane's appeal. On October 27, 2006, Vane Line filed its response, titled "Opposition to Appellee's Motion To Dismiss Appeal or To Affirm Secretary's Order". DNREC filed its response to Vane's pleading on November 3, 2006.

At the hearing, DNREC's counsel agreed that the Board should defer its decision on the Motion until the parties had presented their respective evidence and arguments before the Board with respect to Vane's appeal.[2]

SUMMARY OF APPELLANT'S POSITION

In its prehearing submissions (including its Statement of Appeal) and before the Board at the hearing, Vane makes several legal arguments in support of its contention that the Secretary's status decision and his underlying interpretation of the CZA are erroneous.

Vane argues that the CZA does not specifically regulate or prohibit oil lightering in the coastal zone[3] and that this matter is an issue of first impression, as no entity has

[2] Prior to the hearing, DNREC counsel had represented to Vane's counsel and to the Board (through counsel) that DNREC would not pursue the argument raised in the Motion that Vane lacked standing to file this appeal. Accordingly, that issue was not addressed by the parties or the Board at the hearing.
[3] The term "coastal zone" as used throughout this decision refers to the geographical area defined in 7 *Del. C.* §7002(a).

previously requested permission from DNREC to conduct vessel-to-vessel oil lightering in the Delaware Bay.

Vane contends DNREC's position, that only entities conducting oil lightering (or corporate successors of those entities, such as Maritrans) in the coastal zone on or before June 28, 1971 are permitted to legally lighter oil, is contrary to the CZA, its regulations and applicable case law. Vane specifically contends DNREC's interpretation of the CZA and resulting conclusion (as articulated in the Secretary's status decision) that Vane's proposed vessel-to-vessel oil lightering operation constitutes a new "bulk product transfer facility" (and is therefore expressly prohibited under §7003) is erroneous. Vane argues that DNREC's position that only the bulk product transfer facilities (i.e., "users") lightering oil on or before June 28, 1971 are permitted to continue lightering oil (i.e., are grandfathered), is erroneous and inconsistent with the underlying purpose of the CZA, which is to limit the construction of refineries and similar industrial facilities onshore within the coastal zone. Vane further contends that the Secretary's rationale is flawed because neither the company nor the actual vessels currently lightering oil at the Big Stone Anchorage are the same as those that were operating on or before June 28, 1971.

Vane acknowledges the Delaware Supreme Court's interpretation of (and DNREC's reliance on) the definition of a "bulk product transfer facility" as articulated in *Coastal Barge Corp. v. Coastal Zone Industrial Control Board,* 492 A.2d 1242 (Del. 1985). However, Vane distinguishes *Coastal Barge* because it involved a proposed coal lightering (rather than oil lightering) operation, which the Court held was a new activity

which had not been performed prior to the enactment of the CZA and was therefore prohibited. [4]

Vane argues that a correct interpretation of the CZA by the Secretary warrants a conclusion that its proposed oil lightering operation is a permissible "nonconforming use" of the coastal zone because oil lightering operations were being conducted in the Big Stone Anchorage prior to June 28, 1971.[5] Oil lightering (regardless of the entity conducting the lightering) is neither a "heavy industry use" nor a "bulk product transfer facility") and is therefore permissible under §7003 as a grandfathered "nonconforming use".

Vane contends oil lightering, as a use, can be regulated by DNREC through permit requirements and air pollution controls to address environmental protection objectives under the CZA. Vane also contends DNREC has not regulated the successive entities (including Maritrans) that have been conducting oil lightering since June 28, 1971, and therefore, DNREC should be precluded from now prohibiting Vane's proposed oil lightering operation.

Finally, Vane contends that the Secretary's status decision (and its underlying rationale) leads to an unfair and absurd interpretation of the CZA by creating, in effect, a state-sanctioned monopoly for the only company (Maritrans) currently allowed by DNREC to conduct oil lightering at the Big Stone Anchorage. If one of the goals of the

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[4] In noting that the Secretary's status decision does not define the term "bulk product transfer facility" in reaching his decision that Vane's proposed oil lightering operations are prohibited under the CZA, Vane also argues, in the alternative, that even if its proposed oil lightering operation is deemed a "bulk product transfer facility", that term should be construed to mean oil lightering "operations", rather than actual vessel-to-vessel bulk product transfers. Vane also cites *Coastal Barge* in support of that position.

[5] Vane cites *Norfolk Southern v. Oberly,* 822 F.2d 388 (3d Cir. 1987), in support of that position.

CZA is to limit the expansion of certain industrial activities, that goal has not been achieved because oil lightering operations in the coastal zone have continued to grow and expand since 1971.

SUMMARY OF AGENCY'S POSITION

In its prehearing pleadings (in response to Vane's Statement of Appeal) and before the Board at the hearing, DNREC made several legal arguments in support of the Secretary's status decision. DNREC's primary argument is that Vane's proposed vessel-to-vessel oil lightering operation constitutes a "bulk product transfer facility" as defined by §7002(f) and as that term has been interpreted by the Delaware Supreme Court in *Coastal Barge*. DNREC contends that because neither Vane nor any corporate predecessor of Vane was conducting oil lightering operations at the Big Stone Anchorage in the Delaware Bay on or before June 28, 1971, Vane's proposed oil lightering operation constitutes a "new" bulk product transfer facility in the coastal zone that is strictly prohibited under §§7001 and 7003 and applicable CZA Regulations.[6]

DNREC further contends that Vane's proposed oil lightering operation is neither a "heavy industry use" nor a "bulk product transfer facility" that was in use on or before June 28, 1971 and only under those circumstances would Vane's proposed activity be grandfathered and permissible under §7003. DNREC argues that only the "entity" or the "facility" that was conducting oil lightering on or before June 28, 1971, or

[6] DNREC cites Regulations D.3, D.5, D.6 and D.7 and E.9 in support of its position.

its corporate successor, is entitled to grandfathered rights under §7003 and those grandfathered rights do not flow to an unrelated entity, such as an independent company or a subcontractor.

DNREC argues that oil lightering is not a "use" or "nonconforming use" that is subject to grandfathered rights under the CZA. An interpretation that oil lightering is a grandfathered "use" would defeat the legislative intent of the CZA and lead to unreasonable and absurd consequences that could not have been intended by the General Assembly when it enacted the CZA. DNREC contends, for example, those consequences could include exposing the coastal zone to unlimited new chemical plants because the operation of a chemical plant, as an existing "use" on or before June 28, 1971, would be grandfathered and therefore permissible.

DNREC contends that oil lightering is not permissible (and there is no need for DNREC to monitor oil lightering activity for permitting purposes) in the coastal zone because such new (non-grandfathered) activity is prohibited under §7003.

Lastly, DNREC contends the CZA should be liberally construed to fully achieve its legislative intent and goal of environmental protection. In response to Vane's argument that a monopoly is created as a result of the Secretary's status decision that only one (grandfathered) company may lighter oil in the Big Stone Anchorage, DNREC argues that statutes having an important state environmental protection such as the CZA are generally upheld despite having an economic impact in a wholly nondiscriminatory manner.

SUMMARY OF THE EVIDENCE

Record Below

Prior to the hearing, the Board reviewed the record of proceedings below, which consists of Vane's Request for a Coastal Zone Status Decision with supporting factual and legal arguments dated August 4, 2006, a comment letter to DNREC from the Delaware Nature Society dated August 25, 2006, the Recommendations of DNREC staff to the Secretary dated September 7, 2006, as well as the Secretary's Status Decision dated September 12, 2006, from which this appeal was taken.

Summary of Appellant's Evidence

Vane's case consisted of one fact witness, documentary evidence and arguments of counsel. Vane called Mr. Thomas Gaither as its only witness. Mr. Gaither stated he is the Chief Operating Officer of Vane and has been employed by Vane for approximately 23 years. He described Vane's history, dating back to 1898, and its origins in Baltimore, Maryland. In 1984, Vane bought its first bunker barge to deliver ship bunkers to Baltimore Harbor. Vane currently operates 36 barges and 18 tugboats, which operate in the Delaware Bay, Baltimore and Norfolk. Mr. Gaither testified regarding Vane's safety standards, pollution controls and efforts to comply earlier than required with various regulations regarding double-hulled vessels. Mr. Gaither also testified that he did not know how many oil lightering vessels currently operating in the Delaware Bay are double-hulled.

Mr. Gaither described the Big Stone Anchorage in the Delaware Bay, how lightered oil is transferred directly to six refineries along the Delaware River, including

one in Delaware City, Delaware. In addition to those locations, major oil companies purchase parcels of lightered oil for transport to various other locations in New York, New England, Baltimore and Norfolk.

Mr. Gaither testified that Vane received a solicitation from Sunoco to lighter crude oil in 2005 and was subsequently awarded two contracts in November 2005 to lighter oil in the Delaware Bay. It was that Sunoco proposal that resulted in Vane's earlier initial contact with DNREC regarding the need for an air permit in order to conduct oil lightering. In January 2005, Mr. Gaither and Bob Roosevelt (also from Vane) met with DNREC personnel to start the process for applying for an air permit. Once the contracts were awarded, Vane retained a law firm to assist with the DNREC air permit application. Mr. Gaither stated he had not seen DNREC's June 30, 2005 letter to Vane from Ali Mirzakhalili of DNREC's Air Quality Management Section requesting information from oil lighterers in the Delaware Bay regarding air permit requirements for oil lighterers (the letter was subsequently introduced as DNREC Exhibit 1). He stated he first saw the letter when it was provided to Vane by DNREC's counsel in preparation of this hearing. Mr. Gaither testified subsequent efforts by Vane personnel confirmed that the letter, had, in fact, been received but that it had never been filled out.

Mr. Gaither testified that Vane received a call from Maritrans during the week of November 6, 2006 to provide a barge to assist with oil lightering at Big Stone Anchorage. Upon advice of counsel, Vane refused the request. Vane had never lightered crude oil

previously and has no intention of doing so until completion of additional barges. Mr. Gaither testified that other companies, such as BP, Shell and Valero, have requested Vane to lighter oil at Big Stone Anchorage. Other than Maritrans and Vane, Mr. Gaither testified that Bouchard, Marania, Penn and Hornbeck also lighter oil on the Delaware Bay.

Mr. Gaither stated it was his understanding that no permit was necessary to lighter non-crude oil products in the Delaware Bay. He stated that each time Vane has lightered oil at the Big Stone Anchorage in the Delaware Bay, Vane has filed paperwork with the Coast Guard. Mr. Gaither stated that at no time during his entire period of employment with Vane has he ever been notified that Vane could not lighter non-crude products in Delaware. Mr. Gaither described Vane's oil lightering as "not routine" and he did not know what volume of oil lightering had been conducted by other companies. Vane is continuing to prepare its air permit application with the assistance of a consultant and hopes to have it filed with DNREC by the end of November 2006.

The Board also considered the cross-examination of Mr. Gaither by DNREC. Mr. Gaither testified that the first time Vane may have lightered oil in the Big Stone Anchorage was in 2000. He testified he did not know whether coal lightering had been conducted at any time in the Delaware Bay before June 28, 1971. Vane has been operating out of its Baltimore location since the 1800's and out of its Norfolk location since 1987 or 1988.

Mr. Gaither testified that, to his recollection, the first time Vane conducted lightering of refined oil at the Big Stone Anchorage was probably after 2000. He did not dispute that oil lightering, particularly crude oil lightering, can result in significant emissions into the atmosphere and admitted Vane conducted the described oil lightering without an air permit. Mr. Gaither testified that, to his knowledge, Vane lightered oil in the Big Stone Anchorage once in 2004, six times in 2005, and once in 2006. He provided dates and amounts for each event. He added that Vane's computer records go back to 1999, but he did not have the additional information with him. Mr. Gaither stated that Vane has lightered only refined oil (rather than crude oil) and it was his understanding that no permit was required for non-crude oil.

Regarding DNREC's letter dated June 30, 2005 to Vane, Mr. Gaither testified the addressee, Bob Roosevelt, is an Assistant Environmental Engineer in Vane's Philadelphia office. Mr. Roosevelt reported to Tom Lamm, a Vane Manager. Mr. Gaither admitted that Vane had not responded to that letter. Upon reviewing the letter, Mr. Gaither acknowledged that the letter states that oil lightering can result in significant emissions in the atmosphere.

Mr. Gaither admitted Vane does not have an air quality permit to conduct oil lightering. He stated he is not familiar with Delaware's Oil Protection Liability Act and whether Vane is compliant that Act; however, he stated Vane has complied with Coast Guard reporting requirements. Mr. Gaither acknowledged that he had no evidence indicating that Vane or any of its corporate predecessors were doing business in the Delaware Bay on or before June 28, 1971.

In response to questions from the Board, Mr. Gaither testified his understanding is that Maritrans has an air permit to conduct oil lightering but not a coastal zone permit. Vane has no corporate connection to Maritrans, other than having purchased equipment from Maritrans previously. Although Maritrans has contacted Vane to conduct additional oil lightering, Vane has not responded and has not conducted any additional oil lightering upon advice of counsel. Mr. Gaither stated that Maritrans informed Vane that Vane could operate under Maritrans' permit; however, when Vane requested a copy of the permit by telephone, the Maritrans' representative hung up. Vane did not assume it was permitted to lighter oil just because it had purchased a lightering contract from Maritrans.

Mr. Gaither stated that Vane's failure to respond to the DNREC air permit letter was an error on Vane's part. He stated the Vane's failure to respond was not intentional and that he had not seen the letter previously. The letter must have been misfiled and he had confirmed with Bob Roosevelt and Tom Lamm that they had not received or seen the letter either. It was eventually found in a file in Vane's corporate office in Baltimore.

In response to additional questions from the Board, Mr. Gaither stated that he believed Marania, Hornbeck and Bouchard are other companies lightering oil and that those entities are not connected or under contract with Maritrans. It is his belief that those entities notify the Coast Guard prior to conducting oil lightering.

The Board also considered exhibits introduced by Vane. Those exhibits consist of two newspaper articles dealing with the Coastal Zone (Vane Exhibits 1 and 5); two memoranda (dated October 23, 1973 and August 31, 1971) to the Board from David Keifer of the State of Delaware Planning Office (Vane Exhibits 2 and 4); "Guiding the

Coastal Zone" report dated September 1973 (Vane Exhibit 3); and two air permit applications (dated August 22, 2001 and June 2005) submitted to DNREC by Maritrans Operating Partners, LP (Vane Exhibits 6 and 7).

Vane counsel proffered that the 2005 Maritrans permit application references a "notice of conciliation" between Maritrans and DNREC that addresses an increase in volume of lightered oil between 100 and 120 million barrels in 2005, as evidence that the volume of oil lightering at the Big Stone Anchorage has increased. Vane counsel also proffered (and argued) that both of Maritrans' air permit applications (2001 and 2005) put DNREC on notice (since as early as 2001) that Maritrans was one of several companies conducting oil lightering at the Big Stone Anchorage, as both applications contain a statement by Maritrans that Maritrans is "one of several companies" conducting oil lightering operations at the Big Stone Anchorage.

Summary of Agency's Evidence

DNREC's case consisted of documentary evidence, as well as arguments and proffers of counsel. DNREC's counsel stated that the issue for consideration before the Board is strictly a matter of law and DNREC would not call any fact witnesses for that reason.

The Board considered the three exhibits DNREC introduced in support of its position. Those exhibits consist of a letter dated June 30, 2005 from Administrator Ali Mirzakhalili of DNREC's Division of Air & Waste Management to Vane Brothers Company, c/o Environmental Manager Robert Roosevelt (DNREC Exhibit 1), as well as identical DNREC letters of the same date by the same author addressed to two other

entities: Penn Maritime, Inc. c/o Mr. Jim Sweeney (DNREC Exhibit 2) and K-Sea Transportation Corporation c/o Mr. Richard Heym (DNREC Exhibit 3). DNREC Exhibit 3 includes K-Sea Transportation's response to DNREC dated August 9, 2005.

In response to questions from the Board, DNREC counsel proffered that DNREC does not monitor oil lightering activity in the Bay as it monitors air permitting. There is no communication between the Coast Guard (which monitors and tracks vessels conducting oil lightering activity) and DNREC. Regarding the June 30, 2005 letters from DNREC to suspected oil lighterers, K-Sea was the only recipient who responded, and Vane, Penn and Bouchard did not respond. Maritrans was not sent one of those letters because it already had an air permit issued by DNREC regarding its oil lightering operation in the Delaware Bay. Similar letters were not sent to the same entities regarding the need for a coastal zone permit.

DNREC counsel further proffered that DNREC did not have records of oil lightering volume that was ongoing in 1971 and could not state whether there had been an expansion of oil lightering since that time.

In response to further questioning from the Board, DNREC counsel proffered that DNREC determined Maritrans was the predecessor of the grandfathered oil lightering entity through Vane's Statement of Appeal and an agreement negotiated between Maritrans and DNREC in 2005 and a subsequent Order by the Secretary.

In response to Board questions regarding oil lightering regulations, DNREC counsel proffered that draft regulations for oil lightering required by federal air quality statutes have been published and disseminated for public comment but final regulations

have not been adopted yet. DNREC counsel stated that he believed there is a 30-day comment period and, to his knowledge, no workshop or public hearings had been conducted. DNREC counsel added that, despite air quality permit requirements for oil lightering, such a permit would not be granted unless the entity is in compliance with applicable law, including the CZA. If the entity was not in compliance with the CZA, no air quality permit would be issued by DNREC.

DNREC counsel acknowledged DNREC has an obligation under §7004 to monitor expansions and extensions of activities that are grandfathered, but that §7004 only addresses heavy industry uses. Counsel proffered that DNREC does not have a record of the quantities of oil being lightered but that the quantity is limited by refinery capacity and that capacity has been about the same for several years. In response to a Board question regarding oil lightering capacity in light of increasing consumer demands, DNREC counsel proffered that the need for oil going up the Delaware River is limited by refinery capacity and that the six or seven oil refineries on the Delaware River have been operating at near capacity for several years. DNREC counsel further proffered that Vane's contention that the volume of oil lightering in the Delaware Bay has vastly increased may be correct, but offered no facts in support thereof.

Finally, DNREC's counsel also proffered that there might be other entities conducting oil lightering in the Delaware Bay (in addition to Maritrans). However, if DNREC was unaware of others doing business, there has been nothing to enforce up to this point. However, with the information obtained during this hearing, DNREC would be looking at who is doing business at Big Stone Anchorage.

Summary of Public Comment

The Board also heard comments from the public, pursuant to §7007(c). Two representatives of the public testified before the Board.

The Board considered the testimony of Dominique Baron, who spoke on behalf of the Delaware Nature Society ("DNS"), a statewide nature advocacy organization.

Ms. Baron testified in support of the Secretary's decision and submitted a memorandum from DNS in support of the Secretary's decision (Public Exhibit 1). Ms. Baron stated the organization's position that Vane's proposed oil lightering operation constitutes a new bulk product transfer facility under the CZA and, thus, is expressly prohibited by the CZA and its regulations. Ms. Baron stated the DNS's position is substantially the same as the position set forth in its comment letter to DNREC during the Secretary's status decision process.

The Board also considered the testimony and submission of Knut Hill, who appeared on behalf of the Mid-Atlantic Environmental Law Center. Mr. Hill testified in support of the Secretary's decision and submitted for the Board's consideration a legal memorandum prepared by the Mid-Atlantic Environmental Law Center (Public Exhibit 2).

Mr. Hill summarized the arguments set forth in Mid-Atlantic's legal memorandum. Mr. Hill stated that Vane's legal arguments, if accepted by the Board, would create an exception to the CZA so broad in scope as to render it powerless against further development in the coastal zone. He stated that Vane's proposed oil lightering operation constitutes a new "bulk product transfer facility" which is not entitled to

grandfathering under the CZA. Further, he stated that Vane's claim that oil lightering is a preexisting "use" entitled to grandfathering under the CZA contradicts various provisions of the CZA and would result in absurd results inconsistent with the CZA's stated purpose and intent.

Mr. Hill testified that CZA is intended to protect the coastal zone from two primary threats: "heavy industrial use" and "bulk product transfer facilities". Vane's reliance upon a grandfathered "use" is not relevant because the CZA's grandfathering pertains only to specific bulk product transfer facilities (not uses) and Vane admittedly did not operate a bulk product transfer facility prior to June 28, 1971. Mr. Hill further stated that the term "use" as used in the context of the CZA is location-based, as described in §7002(e) (such as smokestacks, tanks, oil refineries) and in §7002(b), a "non-confirming use" is defined in terms of use of a "structure" or of "land." A "use" is a specific thing in a specific location, such as a particular facility on land or in a structure. Vane's interpretation and argument that a "use" refers to an activity such as oil lightering is contrary to the provisions of the CZA. Mr. Hill stated Vane's position leads to the conclusion that uses such as oil refinering in operation on June 28, 1971 should be grandfathered, thus exposing the coastal zone to additional oil refineries in direct contraction to specific provisions and the legislative intent of the CZA.

In sum, Mr. Hill testified that Vane's argument should fail because it contradicts the text and the purpose of the CZA; and it violates numerous principles of statutory construction, including the requirement to liberally construe the CZA to provide more,

rather than fewer environmental protections, and to avoid interpretations creating absurd results.

FINDINGS OF FACT

Pursuant to §7007(a), the Board may affirm or reverse the decision of the Secretary with respect to applicability of any provisions of the CZA to a proposed use. The issue before the Board is to determine whether the Secretary was correct in his application of §7003 (and related sections) to Vane's proposed oil lightering operation. To that end, and based on the record before it, the Board makes the following findings of fact:

The location known as the Big Stone Anchorage in Delaware Bay is within the coastal zone as defined by §7002(a) of the CZA.[7] Oil lightering, as an activity, was conducted in the Big Stone Anchorage on and before the enactment of the CZA on June 28, 1971 by a corporate predecessor of Maritrans Operating Partners, LP. However, as alleged by DNREC (and as acknowledged by Vane's witness), neither Vane nor its corporate predecessor(s) were conducting oil lightering in the Big Stone Anchorage on or before June 28, 1971.

The Board also finds, based on evidence introduced by Vane, that oil lightering in the Delaware Bay is an important economic activity that serves to supply oil to numerous refineries on the Delaware River (as well as major ports on the East Coast, such as Norfolk, Virginia), resulting in the production and delivery of refined oil and gasoline

[7] The parties did not dispute this fact. See also *Norfolk Southern* at 391. ("The Big Stone Anchorage is within Delaware's territorial limits and is included in the coastal zone as defined by the CZA. *Id* §7002(a)")

products to consumers on the East Coast. Approximately 15% of the oil lightered in the United States occurs at the Big Stone Anchorage, which is the only East Coast sheltered area between Maine and Mexico that is deep enough for large vessels to lighter.

The Board also finds that, other than Vane's recent request, no applications for status decisions under the CZA for oil lightering have been submitted to DNREC and no coastal zone permits (as opposed to air permits) have been granted for oil lightering by DNREC. Prior to its status decision request, Vane submitted an air quality permit application to DNREC. That permit application was returned to Vane for it to submit additional information. During the course of its discussions with DNREC regarding the air permit, Vane was informed by DNREC that Vane was required to apply for a status decision by the Secretary as to whether the proposed oil lightering at the Big Stone Anchorage in the Delaware Bay is permissible under the CZA.

The Board further finds, based on unrefuted evidence (e.g., Maritrans' air permit applications and DNREC's air permit requirement letters to suspected lighterers in June 2005), that it is more likely than not that several entities have lightered oil in the Delaware Bay since June 28, 1971. By the admission of its witness, Tom Gaither, Vane was one of those entities. DNREC counsel proffered that he "can't say that there was any knowledge [by DNREC] that anybody but Maritrans was doing [oil lightering] business out there." However, the Board finds to the contrary, based on the evidence presented, that DNREC knew or should have known that oil lightering was being conducted in the Delaware Bay by entities other than Maritrans. Certainly, DNREC's June 30, 2005 communication to various entities that "[b]*ased on our discussions with the Coast*

Guard" those entities "*may be conducting lightering operations*" must be taken on its face and be construed that DNREC had a reasonable basis for sending such a communication and request for information regarding oil lightering. The Board also finds that DNREC had no reason to believe that any of the contacted entities were entitled to CZA grandfathered rights through a relationship with Maritrans. In support of this finding, the Board notes DNREC counsel's proffer that "*there might be others that are doing business out there* [at the Big Stone Anchorage] *that can show something* [regarding grandfathering]. *And I guess as a result of this hearing, we're* [DNREC] *going to take a long, hard look at who's doing business at Big Stone Anchorage.*"

The Board further finds that DNREC has not kept any records or maintained any oversight over any entities (other than Maritrans) conducting oil lightering in the Delaware Bay. In addition to the lack of documentary evidence, the Board bases this finding on proffers by DNREC counsel. In fact, DNREC counsel also proffered that DNREC determined Maritrans was the predecessor of the grandfathered oil lightering entity through Vane's Statement of Appeal and in an agreement negotiated between Maritrans and DNREC in 2005 and a subsequent Order by the Secretary. The Board finds that DNREC took no action prior to 2005 to determine Maritrans was the only entity allowed to conduct oil lightering in the coastal zone under the grandfather provisions of the CZA.

Lastly, the Board finds that a ship used to lighter oil is a "structure", as that term is commonly defined[8].

[8] The term "structure" is not defined by the CZA or its regulations. 1 *Del. C.* §303 states "[w]ords and phrases shall be read with their context and shall be construed according to the common and approved

CONCLUSIONS OF LAW

The "backdrop" against which the CZA (and any ambiguities therein) must be interpreted is the stated purpose of the CZA (as articulated by the General Assembly in §7001), which is to "control the location, extent and type of industrial development in Delaware's coastal areas...to better protect the natural environment of its bay and coastal areas..."[9] As stated in §7001 and reinforced in 1999 in the CZA Regulations, there is a need to strike a balance between those environmental protection goals and the State's need to encourage the introduction of new industry into the State.[10]

In *Coastal Barge*, the Delaware Supreme Court was asked to interpret the CZA with respect to ambiguous language contained in the statutory definition of "bulk product transfer facility." The Court first noted that, in applying a statute, a "fundamental rule is to ascertain and give effect to the intent of the legislature"[11] and stated "[i]f a statute is reasonably susceptible to different conclusions or interpretations, it is ambiguous. Ambiguity may also arise from the fact that giving a literal interpretation to words of a statute would lead to such unreasonable or absurd consequences as to compel a

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usage of the English language. Technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be 'construed and understood according to such peculiar and appropriate meaning".

[9] §7001 (*Purpose*) states, in part: "It is hereby determined that the coastal areas of Delaware are the most critical areas for the future of the State in terms of the quality of life in the State. It is, therefore, the declared public policy of the State to control the location, extent and type of industrial development in Delaware's coastal areas. In so doing, the State can better protect the natural environment of its bay and coastal areas and safeguard their use primarily for recreation and tourism."

[10] *See* Preamble of the CZA Regulations, which states "These regulations have been developed to accomplish two key goals. They have been designed to promote improvement of the environment within the Coastal Zone while also providing existing and new industries in Delaware's Coastal Zone with the flexibility necessary to stay competitive and to prosper -- all while adhering to the edicts and nuances of one of the most original and innovative environmental and land use statutes in the world." *See also City of Wilmington v. Parcel of Land Known as Tax Parcel No. 26.067.00.004*, 607 A.2d 1163, 1166 (Del. 1992).

[11] *Coastal Barge* at 1246.

conviction that they could not have been intended by the legislature."[12] In reaching its decision in *Coastal Barge*, the Court relied upon a "golden rule" of statutory construction whereby the unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result.[13]

The Board finds that the CZA is ambiguous to the extent its provisions are not entirely clear as to whether an activity, such as oil lightering, is a "nonconforming use" or whether oil lightering constitutes a "bulk product transfer facility." In other words, is the activity of oil lightering defined by the CZA in terms of a "use" or in terms of an entity engaged in the activity (i.e., the "user")? The CZA and its regulations do not specifically define "use".

Vane argues that its proposed oil lightering operation is a "nonconforming use" subject to grandfathering under the CZA rather than, as DNREC argues, a new "bulk product transfer facility" strictly prohibited under §7003 as a facility not in existence on or before June 28, 1971. It is undisputed that oil lightering was ongoing at the time the CZA was enacted. Therefore, the issue is "use" vs. "user": whether oil lightering, as a "nonconforming use" is grandfathered under §§7003 and 7004, thereby allowing Vane to engage in oil lightering despite the fact that neither Vane nor its corporate predecessor was engaged in such activity in 1971 or whether Vane's proposed oil lightering operation is a new "bulk product transfer facility" that was not in operation on or before June 28,

[12] *Id.*
[13] *Coastal Barge* at 1247 (citing 2A. Sutherland, Statutes and Statutory Construction §45.12 (4th ed. 1984)).

1971 and, therefore, prohibited (and not subject to grandfather rights) under §7003.[14] This issue is a question of law, and more particularly, one of statutory interpretation, as no material facts are in dispute. Based on the evidence and its findings of fact, the Board agrees with Vane's argument and concludes that the Secretary's decision must be reversed.

Specifically, the Board concludes that Vane's proposed oil lightering operation is not a new "bulk product transfer facility" as defined by §7002(f)[15]; that oil lightering is a "nonconforming use" as defined by §7002(b)[16]; and that oil lightering, as a "nonconforming use" is permissible under the CZA at levels exceeding those in place on or before June 28, 1971 only by virtue of a permit, in accordance with §7004(a), which covers all nonconforming uses and does not pertain solely to "heavy industry uses", as defined by §7002(e). The Board further concludes, therefore, that it is the activity of oil lightering itself that was grandfathered as an existing use, rather than any specific user (currently Maritrans). In support of its decision the Board provides the following rationale.

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[14] §7003 (*Uses absolutely prohibited in the coastal zone*) states: "Heavy industry uses of any kind not in operation on June 28, 1971, are prohibited in the coastal zone and no permits may be issued therefor. In addition, offshore gas, liquid or solid bulk product transfer facilities which are not in operation on June 28, 1971, are prohibited in the coastal zone, and no permit may be issued therefor. Provided, that this section shall not apply to public sewage treatment or recycling plants. A basic steel manufacturing plant in operation on June 28, 1971, may continue as a heavy industry use in the coastal zone notwithstanding any temporary discontinuance of operations after said date, provided that said discontinuance does not exceed 2 years. An incinerator is neither "public sewage treatment" nor a "recycling plant" for the purpose of this chapter."

[15] §7002(f) states "'Bulk product transfer facility' means any port or dock facility, whether an artificial island or attached to shore by any means, for the transfer of bulk quantities of any substance from vessel to onshore facility or vice versa. Not included in this definition is a docking facility or pier for a single industrial or manufacturing facility for which a permit is granted or which is a nonconforming use. Likewise, docking facilities for the Port of Wilmington are not included in this definition."

[16] §7002(b) states "'Nonconforming use' means a use, whether of land or of a structure, which does not comply with the applicable use provisions in this chapter where such use was lawfully in existence and in active use prior to June 28, 1971."

First, §7002(b) addresses nonconforming *uses*, rather than nonconforming *users*. The term "nonconforming use" is set forth in §7002(b). That section states, in pertinent part:

> "a use, whether of land or of a **structure**[17], which does not comply with the applicable use provisions in this chapter **where such use was lawfully in existence and in active use prior to June 28, 1971**." (emphasis added)

Furthermore, in *Norfolk Southern*, the Third Circuit Court of Appeals addressed the constitutionality of the CZA's ban on new coal lightering facilities in the coastal zone. In a footnote, the Court distinguished coal lightering from oil lightering, stating that "*oil lightering is a **use** that was being performed on June 28, 1971 and is therefore grandfathered under the CZA.*"[18] (emphasis added). In addition, DNREC's knowledge of alleged non-grandfathered entities illegally conducting oil lightering at the Big Stone Anchorage and DNREC's failure, to date, to regulate or otherwise act (if for no other reason, to protect the environment) in response to the alleged illegal activity creates an inference, which the Board finds persuasive and accepts, that DNREC deemed oil lightering a grandfathered "use", rather than a use permissible only when performed by a grandfathered "user". Only in response to Vane's application did DNREC formally articulate its position with respect to the permissibility to lighter oil at the Big Stone Anchorage in the Delaware Bay, despite numerous prior opportunities to do so.

Second, DNREC contends that Vane's proposed oil lightering facility cannot constitute a nonconforming use if it falls within the CZA's definition of a bulk product

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[17] As noted above, the Board found that a vessel conducting oil lightering is a "structure". The Board also finds that oil lightering involves the use of such a structure for an activity which was in existence and actively pursued in the coastal zone prior to June 28, 1971.
[18] *Norfolk Southern* at 391.

transfer facility. In support of its position, DNREC argues that because § 7002(f) (definition of bulk product transfer facility) is the more specific definition in § 7002 than that of §7002(b) (definition of a nonconforming use), the former section should be controlling. The Board disagrees with DNREC's analysis.

Both §§7002(b) and 7002(f) are contained in the "Definitions" section in the CZA. Section 7002(f) would only constitute a more specific definition *if* the Board were to assume (as does DNREC) that oil lightering activity could only be defined as a bulk product transfer facility and could never be defined as a use. While §7002(f) and the Delaware Supreme Court's holding in *Coastal Barge* warrant the conclusion that the *physical connection* of one of Vane's vessels to another vessel at the Big Stone Anchorage, for the purpose of transferring of oil between those two vessels, constitutes a "bulk product transfer facility", that does not preclude the Board from finding that the *activity* of oil lightering constitutes a "nonconforming use" under the CZA.

Third, the Board also disagrees with DNREC's contention that Vane's proposed oil lightering activity is a "new" bulk product transfer facility. While the actual lightering of oil, which involves the connection of two ships via a hose or pipe to transfer oil from one to the other, may itself constitute a bulk product transfer facility, there is nothing "new" about Vane's proposed activity. Oil lightering has been conducted in the Delaware Bay for more than 35 years and prior to the enactment of the CZA.

In support of its contention that Vane's proposed activity constitutes a "new" bulk transfer facility, DNREC relies upon the precedent of *Coastal Barge*. In *Coastal Barge*, the Court determined a proposed coal lightering operation was a "bulk product transfer

facility" as defined in the CZA, and held that the operation was prohibited under §7003 as a "new" facility not in operation on June 28, 1971. The Board agrees with Vane that *Coastal Barge* is not controlling in this matter as it can be distinguished on the grounds that the use at issue (coal lightering) was not being performed at the time the CZA was enacted. Unlike coal lightering, oil lightering was an ongoing activity when the CZA was enacted.

Fourth, DNREC next argues that §7004 pertains only to "heavy industry uses", as defined by §7002(e), and therefore, it does not cover all nonconforming uses. The Board disagrees and concludes that §7004 is intended to regulate all "nonconforming uses" as defined by §7002(b), by requiring a permit for any expansion or extension of such uses.[19]

Section 7004(a) (*Uses allowed by permit only; nonconforming uses*) states:

> "Except for heavy industry uses, as defined in §7002 of this title, manufacturing uses not in existence and in active use on June 28, 1971, are allowed in the coastal zone by permit only, as provided for under this section. **Any nonconforming use in existence and in active use on June 28, 1971, shall not be prohibited by this chapter and all expansion or extension of nonconforming uses, as defined herein, and all expansion or extension of uses for which a permit is issued pursuant to this chapter, are likewise allowed only by permit.** Provided, that no permit may be granted under this chapter unless the county or municipality having jurisdiction has first approved the use in question by zoning procedures provided by law. (emphasis added).

A reasonable interpretation of this section (in light of the Delaware Supreme Court's guidance in *Coastal Barge*) warrants the Board's conclusion that the phrase "expansion or extension" refers to any increase in the volume from the amount of oil being lightered on June 28, 1971, in order to achieve the environmental protection goals

[19] For permitting purposes, it is DNREC's obligation to monitor expansions and extensions by determining and tracking certain baseline levels of oil lightering, the increase of which would require a permit.

of the CZA, while also providing flexibility for new and existing (and perhaps more technologically advanced) businesses to continue a grandfathered use.[20] DNREC's position that only heavy industry uses can constitute nonconforming uses under §7004 would lead to the unreasonable conclusion that any expansion or extension of a non-heavy industry use could not be regulated under the CZA.

Finally, the Board rejects DNREC's argument that the classification of oil lightering as a "nonconforming use" will consequently result in construction and operation of new refineries and chemical plants in the coastal zone. The Board finds, as a matter of law, that any new refinery or chemical plant would meet the definition of a "heavy industry use", as defined by §7002(e), which is expressly prohibited by §7003 and would not be subject to grandfathered rights under §7004(a). However, the continued use of existing refineries and chemical plants is grandfathered under the §7003 (as well as §7004(a)) and any expansion or extension of those facilities is permissible by permit only, in accordance with §7004(a).[21]

[20] By its own admission, however, DNREC (through the proffer of its counsel) has no records of the volume being lightered in 1971 or any volume since that time.

[21] In light of the Board's conclusion that oil lightering is a grandfathered "nonconforming use", Vane's argument regarding the creation of a state-sanctioned monopoly is moot and need not be addressed by the Board. Nonetheless, the Board questions DNREC's negotiation of exclusive oil lightering rights to one company (Maritrans) in 2005, more than 30 years after passage of the CZA and its intention to deny future contracting and subcontracting by Maritrans with other companies.

BOARD'S DECISION AND ORDER

For the foregoing reasons, the Board, following public deliberations and by an affirmative vote of 5 of the 6 members present, REVERSES the Secretary's decision (and denies DNREC's "Motion to Dismiss Appeal or Affirm Secretary's Order").

SO ORDERED this 1st day of December, 2006.

COASTAL ZONE INDUSTRIAL CONTROL BOARD

The following Board members concur in this decision.

Date: 12/1/06

Christine M. Waisanen
Chair

Coastal Zone Industrial Control Board
Appeal CZ 2006-01

The following Board member dissents (see attached dissenting opinion).

Date: December 1, 2006

Robert D Bewick

Robert D. Bewick, Jr.
Member

Rationale for the vote of Robert D. Bewick, Jr.

At the CZICB November 16, 2006 Hearing of Vane Brothers Company Appeal

My voting "No" to the Motion made by Victor Singer to over-ride the Secretary's Decision of the Vane Brothers Company Status Decision under the Coastal Zone Act is based upon the testimony presented at the November 16, 2006 Hearing, my reading of the Coastal Zone Act and all other information provided me before the Hearing by Gail L. Donovan, Administrative Assistant and Frank N. Broujos, Deputy Attorney General representing our Board along with the Board's public deliberations following the Hearing testimony.

It is my opinion that the Secretary's decision that Vane Brothers Company's proposed oil lightering off of Big Stone Beach in the Delaware Coastal Zone was a correct decision and our Board should have upheld that decision. I base my opinion upon the following:

- Section 7002, paragraph (f) of the CZA states "Bulk product transfer facility" means any port or dock facility, whether an artificial island or attached to shore by any means, for the transfer of bulk quantities of any vessel to onshore facility or vice versa. The Delaware Supreme Court ruled that the vessel to vessel transfer of coal in the Delaware River fell within the Coastal Zone Act's prohibition against bulk transfer of bulk products "from vessel to onshore facility or vice versa" so therefore I conclude that the transfer of oil would also fall within the Coastal Zone Act's prohibition.

- Section 7003, (a) states in 2nd sentence "In addition, offshore gas, liquid or solid bulk product transfer facilities which are not in operation on June 28, 1971, are prohibited in the coastal zone, and no permit may be issued therefore."

- The testimony of Vane Brothers CEO at the Hearing clearly stated that Vane Brothers Company was not doing oil or any other lightering in the Delaware River on or before June 28, 1971.

While I do not like that DNREC has taken the position that only Maritrans qualifies under the Coastal Zone Act to do oil lightering in the Delaware River, I believe for the reasons I have given above, the Secretary was correct in denying Vane Brothers Company status request to allow it to do oil lightering in the Delaware Coastal Zone and that is why I voted No to the Motion approved by the CZICB following the November 16, 2006 Hearing. I further request that this statement be included in the public written record of the Hearing.

BOARD'S DECISION AND ORDER

For the foregoing reasons, the Board, following public deliberations and by an affirmative vote of 5 of the 6 members present, REVERSES the Secretary's decision (and denies DNREC's "Motion to Dismiss Appeal or Affirm Secretary's Order").

SO ORDERED this 1st day of December, 2006.

COASTAL ZONE INDUSTRIAL CONTROL BOARD

The following Board members concur in this decision.

Date: 12/1/06

Christine M. Waisanen
Chair

Coastal Zone Industrial Control Board
Appeal CZ 2006-01

Date: 12-1-06

Robert Welsh
Member

Date: 11/30/06

Albert Holmes
Member

Coastal Zone Industrial Control Board
Appeal CZ 2006-01

Date: Dec 1, 2006

Pallather M. Subramanian

Pallather M. Subramanian
Member

Coastal Zone Industrial Control Board
Appeal CZ 2006-01

The following Board member dissents (see attached dissenting opinion).

Date: December 1, 2006

Robert D Bewick

Robert D. Bewick, Jr.
Member

Coastal Zone Industrial Control Board
Appeal C2 2006-01

Date: Dec 1 2006

Victor Singer
Member